

No. 21,124

United States Court of Appeals
For the Ninth Circuit

ROSA CONTINENTE, dba G. CONTINENTE, vs. JOHN A. CONTINENTE, 	}	<i>Plaintiff-Appellant,</i> <i>Defendant-Appellee.</i>
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BRIEF ON BEHALF OF DEFENDANT-APPELLEE

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VS.	
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BRIEF ON BEHALF OF DEFENDANT-APPELLEE

In order that there be a just and final disposition of the issues in this proceeding, and in view of the importance of the matter to the Defendant-Appellee, it is deemed necessary to make a full reply to the brief of the Plaintiff-Appellant. It is submitted at the outset that the argument presented on behalf of the Plaintiff-Appellant is not in accordance with the facts or the law.

STATEMENT OF THE CASE

The action here was brought for alleged trademark infringement and unfair competition and each and every material allegation was denied. The primary

issue with which we are concerned is the right of the Appellee to use his own name, John A. Contiente, in the marketing of fresh grapes.

Following a full trial on the merits, the District Court held (R. 82-87):

1. That everything the Appellee had done was calculated to distinguish his grapes from those of the Appellant and to avoid unfairly competing in the same markets.

2. That the Appellee took every reasonable step to guard against creating confusion or deception and at no time did he imitate or copy the style or script of the Appellant.

3. That the Appellant has used a particular ensemble showing Contiente with a pictorial representation of a small girl primarily in connection with sales through wholesale markets in New York.

4. That in an earlier appraisal of the propriety of using John A. Contiente, Judge Stanley A. Weigel approved the use of John A. Contiente in the same size of block type in denying an application for a preliminary injunction.

5. That regardless of irregularities the U.S. registration 591,366 for Contiente Brand should not be cancelled for fraud in the procurement of the registration.

6. That the Appellant failed to present testimony to support the contention that the "Contiente" name had acquired a secondary meaning.

7. That the weight of authority indicates that the proper role of the Court is to correct any abuse of the important right to use a personal name rather than to determine that right.

8. That the Appellee did not adopt and is not using his own personal name for the purpose of impressing the public that the grapes originate with the Giovanni Continente family.

9. That considering the narrow and highly specialized markets in which sales are made by the Appellant and the Appellee, there is no likelihood of confusion or mistake under the Requirements of the Lanham Act (15 U.S.C. 1114).

The Appellee maintains that the action of the District Court, on the basis of the testimony and evidence, was entirely correct and proper and that the specification of errors relied upon by the Appellant is without merit.

THE FACTS

The factual situation in this case is somewhat unusual. This is clearly and plainly not one of the ordinary run of cases in which someone has endeavored without justification to ride the coat-tails of a widely known and extensively advertised family name brand. In this proceeding the facts present a distinctly different picture.

We see that the Appellee, John A. Continente, is now engaged in the business of growing and marketing

fresh fruits and nuts, having ranches at Oakley and Brentwood (TR. 115-117) and has lived in Oakley all of his life. He is the son of Andrea Continente, who was also known as Andrew Continente, and he is the brother of Anthony Continente and Vincent Continente. His father worked with the Appellee's uncle, Giovanni Continente, also known as G. Continente, from 1920 until his death in 1943. Upon the death of his father, the Appellee acquired ranch property and commenced the marketing of grapes. It is clear that the uncle, Giovanni Continente, was the business head of the entire family and occupied a patriarchal position according to a recognized old world pattern and that the members of the family marketed their grapes through him.

In 1962 the Appellee decided to sell his grapes on his own account under labels showing his name and address (TR. 118-119) but had never at any time used the name Continente alone (TR. 129).

The testimony indicated that the normal marketing season for the Oakley-Brentwood area is during the months of September and October and that in 1962 and 1963 all of the grapes of the Appellee were marketed under the name of John A. Continente in British Columbia, Canada (TR. 127-128). This is significant, particularly since there has never been the slightest indication of any actual confusion in the trade at any time, which was admitted by the Appellant (TR. 163). With respect to the scope of use of the family name in connection with the business of the Appellant, it is important to emphasize the fact

that, regardless of the registration of the term *Continente Brand*, the grapes have always been marketed through the one outlet in New York under the label showing *Continente Brand* with the picture of a small girl and the name "G. *Continente*", as indicated by Appellant's Exhibits 5 and 7 (TR. 18, 20).

It is highly relevant that all sales of the Appellant were made through a single outlet, a certain D. L. Scotto in New York (TR. 33, 34, 49, 94) until his death in 1962 (TR. 105). The witness, Bianco, whose testimony was brushed aside by the Trial Court, claimed to represent the Appellant subsequent to the death of Scotto, but the entire fabric of the Appellant's record is suspect when we read the testimony of Napolitano (TR. 106) which we now quote:

"A. We didn't do any business with Bianco in '63. He contacted us, but there was no business.

Q. Has he done some this year?

A. He is going to.

Q. He hasn't yet?

A. Not yet."

The Appellant failed to produce any evidence of actual advertising of the brand in New York or in any other place and this is significant because it is fundamental that a family name is not subject to exclusive appropriation as applied to any goods, regardless of registration under any statute, unless the name has acquired a secondary meaning by reason of long and extensive use and advertising. It is convincingly obvious that the limited use of the family name "*Continente*" by the Appellant in the New York market,

and the absence of advertising, would not support any claim of secondary meaning in the New York area, and could not support any claim of secondary meaning elsewhere in the United States or in any other place.

On page 7 of the brief of the Appellant, certain testimony has been quoted which must be explained to avoid any false impression as to the remarks of the Appellee. We have it in mind that when a statement is quoted out of context or from a written record, the consideration given to the matter by the Trial Court and the action taken should be controlling. It is quite clear that the Appellee, John A. Continente, was certainly not speaking as a lawyer or as one familiar with legal matters. In the first place, he was expressing his belief that he had a right to use his own name, without understanding that the use of a family name would be governed in a large measure by the same principles as other words and names. The important fact is that he never at any time used the family name "Continente" alone in connection with the marketing of his grapes. As to the matter of inferior grapes, it seems plain enough that the witness simply meant that the sale of any inferior grapes in the same market might be injurious and this would seem to be a normal and sensible thought, having nothing whatever to do with a comparison of brand names or of personal names. It is to be noted that the Trial Court, hearing the evidence and observing the witnesses, attached no particular significance to such statements.

EFFECT OF REGISTRATION CLAIMED BY APPELLANT

Although the Trial Court concluded that the irregularities in the procurement of the registration did not constitute fraud, with which we are not in agreement, we deem it advisable to consider the facts, particularly since the Appellant seeks to over-emphasize the *meaning* of the registration.

It is to be noted that registration No. 691,366 issued on June 15, 1954 covering the words **Continente Brand** for fresh fruits—namely, grapes, apricots, plums, nectarines, and other stone fruits, this being in the name of Giovanni Continente, doing business as G. Continente. The registration was granted under the provisions of 15 U.S.C. 1052, Section 2 (f) of the Trademark Act of July 5, 1946, based upon a claim of secondary meaning by reason of extensive use. The verified trademark application claimed use of the alleged mark for the goods mentioned above, which was not true (see deposition Rosa Continente, pages 16 to 22, Appellant's Interrogatories 6 to 14). Since the Commissioner of Patents was not advised correctly as to the use of the name, the registration certificate was issued much broader in scope than that to which the applicant was entitled.

Proceeding further, we see that on November 25, 1959 the Appellant in this action, Rosa Continente, signed and executed a false affidavit for the purpose of retaining the registration under the law, knowing well that the family name had never been used as alleged.

We see now that on October 7, 1964 another affidavit was executed by Rosa Contiente (Appellant's Exhibit No. 4) which was signed and filed following the denial of a motion for a preliminary injunction, which affidavit constitutes an admission of the charges made as to the false statements in the original application and in the 1959 affidavit claiming incontestability. Aside from the admission, the affidavit is misleading because there is apparently a calculated omission of a definite requirement in 15 U.S.C. 1065 (2), Section 15 which reads:

“(2) there is no proceeding involving said rights pending in the Patent Office or in a court and not finally disposed of; and”

The significance of this is that the affidavit failed to inform the Commissioner that there was a pending proceeding involving the registration. Obviously if the statutory requirement had been followed, the Commissioner would not have accepted the amendment of correction until the conclusion of the present proceeding.

Having in mind the purpose of our federal trademark statute, it is definitely wrong to endeavor to obtain broader coverage than that sanctioned by the law. In this connection we find that in *The Reese Chemical Co. v. Lisner*, 87 USPQ 121 (1950) the Commissioner held that when an application claimed use of a mark for a number of products and it was established later that this was a false statement, the registration should be cancelled, and he concluded as follows.

“Under these circumstances, I do not believe that the Office should take it upon itself to restrict the registration so as to eliminate all the goods on which the registrant never used the trade mark, and also the goods on which applicant used the trade mark but on which it is no longer using the mark. To do so would carry an implication of condonation of the false allegations, and may also carry an implication that the Patent Office considers the registration valid after it has been limited. I believe that in circumstances such as presented here the Office should cancel the registration entirely, rather than restrict it.”

The federal statute provides expressly that a mark that is primarily merely a surname shall not be registered unless the mark has become distinctive and there is proof of substantially exclusive and continuous use for the five year period preceding the filing of the application (15 U.S.C. 1052, Section 2 (f), and there is absolutely no evidence of such use in this case, which warrants a consideration of the decision of Judge Caffrey in the recent case of *Blanchard & Co., Inc. et al. v. Charles Gilman & Son, Inc., et al.*, 145 USPQ 62 (DC Mass., 1965) (page 65), involving a lack of secondary meaning, wherein he held that:

“I find and rule that plaintiff’s three trademarks are primarily merely a surname, that the material other than the word ‘Blanchard’ contained in each of the three marks does not obviate the bar of Section 1052-(e)(3), and that consequently these three trademarks were improperly issued, should be, and hereby are, cancelled.”

In the light of the foregoing and on the basis of the testimony and evidence in this case, the argument put forth in the brief of the Appellant as to the exclusive right to use a registered mark in commerce and that there is no requirement to establish a secondary meaning would seem to be specious, to put it mildly. In the first place, since the record here established the fact that the grapes of the Appellant have been sold through one outlet in New York, whereas the grapes of the Appellee have been marketed in British Columbia, we consider as apropos the remarks of the Court in *Dawn Donut Company, Inc. v. Hart's Food Stores, et al.*, 267 F.2d 358, 121 USPQ 430 (CA 2, 1959) (page 434) that:

“The Lanham Act, 15 N.S.C. Sec. 1114, sets out the standard for awarding a registrant relief against the unauthorized use of his mark by another. It provides that the registrant may enjoin only that concurrent use which created a likelihood of public confusion as to the origin of the products in connection with which the marks are used. Therefore if the use of the marks by the registrant and the unauthorized user are confined to two sufficiently distinct and geographically separate markets, with no likelihood that the registrant will expand his use into defendant's market, so that no public confusion is possible, then the registrant is not entitled to enjoin the junior user's use of the mark. See *Fairway Foods, Inc. v. Fairway Markets, Inc.*, 227 F.2d 193, 107 USPQ 253 (9 Cir. 1955); Note, *Developments in the Law of Trademarks and Unfair Competition*, 68 Harv. L. Rev. 814, 857-60 (1955); cf. *Sterling*

Brewers, Inc. v. Cold Springs Brewing Corp.,
supra.”

We consider the Appellant to be in error in attempting to rely heavily on a claimed exclusive right to use and on incontestability. In this connection we deem as highly relevant the remarks of this Court in *Tillamook County Creamery Association v. Tillamook Cheese and Dairy Association*, 345 F.2d 158, 145 USPQ 244 (CA 9, 1965) (page 247) that:

“Without basing any special argument thereon or seeming to attach significance to it, the appellant suggests that since it had filed the required affidavit under the Lanham Act, 15 U.S.C. 1065, it had obtained incontestability of that registration. Appellant properly refrains from arguing that this incontestability provision aids it in its action. There is no attempt here to deny the right of the plaintiff to continue to use the name or mark ‘Tillamook’. All that is involved here is the plaintiff’s attempt to enjoin the defendant from using its own name on its cheese in the manner previously described, and the right of the defendant to require the appellant to cease from its harassing tactics by which it attempts to prevent customers from purchasing the defendant’s product. The provision relating to incontestability is a defensive provision; it has no offensive effect. If plaintiff has attained incontestability of its mark, its registration could not be cancelled by a proceeding to cancel the same. But this does not aid the plaintiff in any claim that it has an exclusive right to the name or mark or that it may rely on the same as a basis for an injunction against

the defendant. In *John Morrell & Co. v. Reliable Packing Co.*, 7 cir., 295 F.2d 314, 316, 131 USPQ 155, 156-157, the court said of incontestability: 'This section (15 U.S.C. Sec. 1115) was intended to protect a registrant from having its mark cancelled by a prior user claiming superior rights.' The court then went on quoting from other authority: '“These statements seem to reflect a misconception of the effect of a registration of a mark, the right to use of which has become incontestable. The effect of ‘incontestability’ is a defensive and not an offensive effect.”’”.

**IT IS FUNDAMENTAL ANY RIGHTS IN A FAMILY
NAME ARE LIMITED IN FACT AND IN LAW**

The weight of authority is overwhelming that a man has a right to make a fair and proper use of his name. There is a great and wide difference between a policy of protecting a family name brand that has actually acquired a secondary meaning as applied to a product, by reason of long and extensive use and advertising, and one that has been used only in an extremely limited fashion in a specific area without any advertising to speak of. It is not difficult to understand that certain brand names of this character have acquired a secondary meaning throughout the nation, such as Eastman for photographic equipment, Campbell's for soup, Gillette for razors, or Williams for shaving soap. The effort made in the brief of the Appellant to place *Contimente* in that category is completely ineffectual. The Appellant has referred to the decision of this Court in *The Fleischmann Distill-*

ing Corporation et al. v. Maier Brewing Company et al., 314 F.2d 149, 136 USPQ 508 (CA 9, 1963) in support of a consideration of likelihood of confusion. That proceeding involved one of the best known arbitrary brands in the country, Black & White, for Scotch whisky and the use of the identical mark for beer. There was no question in the case as to differences in marks or in marketing areas. The Court reasoned that the use of Black & White for beer would be associated in the mind of the buyer with Black & White whisky and that there might be a likelihood of confusion as to the source of origin of the products. This is a far cry from the situation with which we are concerned.

Nims, a recognized authority on the subject, in his *Unfair Competition and Trade-Marks*, 4th Edition (1947) Vol. 1, page 192, states that "Every man has a right to the use of his own name. That is the first principle", and on page 571 he states further:

"A family name or surname cannot be appropriated to the exclusion of others who may bear the same name. Therefore a personal or family name cannot be a technical trade-mark."

We note that in a case involving the name Mel's *D & W Food Corp. et al. v. Graham*, 286 P.2d 55, 107 USPQ 24 (Calif. Dist. Ct. App., 1955), page 26, the Court stated:

"The trial judge in directing judgment for the defendant filed the following memorandum decision:

"In this matter it seems to be clear that a person may not be enjoined from using his own name

in his business, provided he is not guilty of fraud, deceit, or artifice in so doing which causes injury or damage to another. No authorities have been presented which make any distinction on principle between the use of one's full name and the use of only a part of his name. In this case the Court finds no fraud, deceit or artifice on the part of defendant in the use he has made or is making of his own name in his business.' ”

In addition, the Court stated further that:

“There are really two basic problems involved. One is whether the first in the field has established an exclusive property interest in the name as a trademark that warrants an injunction, and the other is whether the second in the field has been guilty of unfair competition so as to warrant an injunction. The two problems overlap, and the cases do not always recognize the distinction between them. Some of the cases, however, have recognized the distinction. See *Dunston v. Los Angeles Van etc. Co.*, 165 Cal. 89, 94; *Yellow Cab Co. of San Diego v. Sachs*, 191 Cal. 238, 242; *Dodge Stationery Co. v. Dodge*, 145 Cal. 380, 387; *Tomsky v. Clark*, 73 Cal. App. 412, 417; see also *Bus. & Prof. Code*, Sec. 14400, as compared with *Civ. Code* Sec. 3369.

In the instant case it is quite clear that, as against defendant, plaintiffs do not possess a property right in the use of the name ‘Mel’s’ that is entitled to the protection of an injunction.”

In the recent case of *John P. Dant Distillery Co. v. Schenley Distillers, Inc.*, 128 USPQ 456 (DC WD Ky., 1960) the Trial Court held that the trademark John P. Dant is not confusingly similar to the mark

J. W. Dant for whiskey, and this ruling was affirmed on appeal by the Court of Appeals, Sixth Circuit, 132 USPQ 287 (1962). The reasoning in the *Dant* case was approved and followed in *Crane Co. v. Crane Heating & Air Conditioning Co., et al.*, 132 USPQ 478 (CA 6, 1962), in which it was held that the family name Crane was being used fairly and properly, there being no evidence of any damage to the Crane Co., and in this connection (page 479) the Court commented as follows:

“In our opinion, the Crane brothers had the right to use their surname Crane in their business so long as they did not attempt to palm off the products which they handled as products of Crane Co. or mislead the public into believing that they were dealing with Crane Co. *S. C. Johnson & Co. v. Johnson*, 266 F.2d 129, 121 USPQ 63 (CA 6, 1959); *Dant Distillery Co. v. Schenley*, 297 F.2d 935, 132 USPQ 87 (CA 6, 1962) affirming 189 F. Supp. 821, 128 USPQ 456.

It was, of course, proper for R. J. Crane to use his surname in the business which he established known as Crane Co. The Crane brothers have the same privilege so long as they do not attempt to deceive or mislead.”

We contend that there has been no change in the law with respect to personal and family names, and in *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U.S. 118, 25 Sup. Ct. Rep. 609 (1905), 49 L. Ed. 972 (page 985) Mr. Justice Fuller stated:

“But it is well settled that a personal name cannot be exclusively appropriated by any one as against others having a right to use it; and as the

name 'Remington' is an ordinary family surname, it was manifestly incapable of exclusive appropriation as a valid trademark, and its registration as such could not in itself give it validity. *Brown Chemical Co. v. Meyer*, 139 U.S. 540, 35 L. ed. 247, 11 Sup. Ct. Rep. 1002; *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U.S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270."

The problem of the family name was evaluated carefully by Mr. Justice Holmes in *James W. Donnell v. Herring-Hall-Marvin Safe Co. et al.*, 208 U.S. 267, 52 L. Ed. 481 (1907) in holding that the name HALL could not be exclusively appropriated. In this case John A. Contiente, and his father before him, have been engaged in the family grape growing business at Oakley. He is in no sense of the term a newcomer in the field and his use of his own name has been a fair use.

THERE IS NO LIKELIHOOD OF CONFUSION

The Trial Court found, and properly so, on the basis of the testimony and evidence, that there is no likelihood of confusion (R. 84, 98). In this connection we observe that in the brief of the Appellant there is cited *John R. Thompson Co. et al. v. Holloway et al.*, 366 F.2d 108, 150 USPQ 728 (CA 5, 1966) (page 732), and we note that in that decision the Court stated that:

"Likelihood of confusion is a question of fact. The district court had superior opportunity to judge the credibility of the witnesses and to find

the facts. There is support for its findings and they cannot now be set aside as clearly erroneous."

and referred with approval to Rule 52(a), F.R.C.P.; *American Foods, Inc. v. Golden Flake, Inc.*, 312 F.2d 619, 136 USPQ 286 (5 Cir., 1960); *Squirrel Brand Company v. Barnard Nut Co., Inc.*, 224 F.2d 840, 106 USPQ 296 (5 Cir. 1955); and *Chappell v. Goltsman*, 197 F.2d 837, 94 USPQ 40 (5 Cir. 1952).

With respect to the importance of findings of a Trial Court, we note that in *Lerner Stores Corporation v. Lerner*, 162 F.2d 163, 73 USPQ 524 (CA 9, 1947), on page 525, this Court reasoned as follows:

"The trial court found against appellant on each of these controlling questions. Unless the findings of the trial court are clearly erroneous, we are required to affirm the judgment notwithstanding contrary evidence appears but was not accepted by the trial court. We do not understand appellant to dispute this settled principle but, on the contrary, to complain that the court failed to consider evidence free of conflict, a consideration of which would have compelled different findings and a judgment in appellant's favor."

We realize that under certain conditions an independent evaluation of certain questions may be proper, but in the present proceeding we feel strongly that there is no error in the decision of the Trial Court as to any matters of fact or law. We regard as pertinent the statement of this Court in *Plough, Inc. v. Kreis Laboratories et al.*, 314 F.2d 635, 136 USPQ 560 (CA 9, 1963) (page 564) that:

“While it is true that under certain circumstances we are as well able as the trial court to determine if there is a likelihood of confusion by a mere visual or auditory comparison of the marks protected and allegedly infringing, we cannot, on the record here before us, differ with the trial judge, much less hold his findings to be clearly erroneous. See *Chappell et al. v. Goltsman et al.*, 5 Cir. 1952, 197 F.2d 837, 839, 94 USPQ 40, 42.

The mere use of a name which appellees had a right to use can not in and of itself constitute unfair competition.”

We find what we consider to be a convincing statement as to the correct view and approach to the problem in *The Fleetwood Company v. Hazel Bishop, Inc.*, 352 F.2d 841, 147 USPQ 344 (CA 7, 1965) (page 347, wherein the Court concluded that:

“The scope of our review of a district court’s findings of fact in trademark and other actions is limited to a determination of whether such findings are clearly erroneous. *Teter, Inc. v. Rheem Manufacturing Company*, 7 Cir., 334 F.2d 784, 786, 142 USPQ 347, 348 (1964); *Armour & Co. v. Wilson & Co.*, 7 Cir., 274 F.2d 143, 145, 124 USPQ 115, 125 (1960).

The likelihood of consumer confusion between trademarks is a question of fact. *G. D. Searle & Co. v. Chas. Pfizer & Co.*, 7 Cir., 231 F.2d 316, 318, 109 USPQ 6, 7 (1956).”

We submit that the decision of the Trial Court was correct and just on the issue of trademark infringement and unfair competition, and that there is no

testimony or evidence that would suggest that the findings are erroneous in any respect whatever.

CONCLUSION

In view of the foregoing, the Appellee submits that the decision of the District Court should be affirmed and this appeal dismissed with costs.

Dated, San Francisco, California,
February 2, 1967.

Respectfully submitted,
WILLIAM G. MACKAY,
Attorney for Defendant-Appellee.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLIAM G. MACKAY,
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